

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent,

-vs-

EDWARD P. COLLICOTT, SR.,

Movant.

NOS. CR-94-0184-WFN
CV-06-0053-WFN

ORDER

Pending before the Court is Movant's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence. (CR-94-184, Ct. Rec. 157; CV-06-053, Ct. Rec. 1). The Motion is submitted by Edward Collicott, who is appearing *pro se* in these proceedings.

BACKGROUND

Mr. Collicott was Indicted on August 24, 1994 for: (1) Possession with Intent to Distribute Methamphetamine; (2) Possession with Intent to Distribute Heroin; and (3) Possession with Intent to Distribute Cocaine. On January 19, 1995, a jury found Mr. Collicott guilty of all three counts. Mr. Collicott timely appealed the judgment, and on September 12, 1996, the Ninth Circuit reversed and remanded the matter for a new trial.

A second jury was convened on November 4, 1996. That jury also returned guilty verdicts on all three counts. On December 11, 1996, Mr. Collicott was sentenced to a 210-month term of imprisonment. Mr. Collicott timely appealed, and on March 13, 1998, the

1 Ninth Circuit affirmed the judgment of the district court. Mr. Collicott's judgment became
2 final for purposes of collateral attack ninety days later, when the certiorari period expired.

3 During Mr. Collicott's second trial, the Government introduced the testimony of Zaidi
4 Maulauni from the first trial. Mr. Collicott unsuccessfully challenged this testimony by way
5 of a motion in limine. He now renews his assertion that his Sixth Amendment right to
6 confrontation was violated by the admission of this testimony because he was not allowed to
7 cross-examine Zaidi Maulauni at the second trial. *See Crawford v. Washington*, 124 S.Ct.
8 1354, 1374 (2004)("Where testimonial statements are at issue, the only indicium of reliability
9 sufficient to satisfy constitutional demands is the one the Constitution actually prescribes:
10 confrontation.").

11 DISCUSSION

12 The statute provides that only if the Motion, file and records "conclusively show
13 that the movant is entitled to no relief" may the Court summarily dismiss the Motion
14 without sending it to the United States Attorney for response. 28 U.S.C. § 2255. The
15 Rules regarding section 2255 proceedings similarly state that the Court may summarily
16 order dismissal of a 2255 motion without service upon the United States Attorney only
17 "if it plainly appears from the face of the motion and any annexed exhibits and the
18 prior proceedings in the case that the movant is not entitled to relief in the district
19 court." Rule 4(a), RULES-SECTION 2255 PROCEEDINGS. Thus, when a movant fails to
20 state a claim upon which relief can be granted or the motion is incredible or patently
21 frivolous, the district court may summarily dismiss the motion. *Cf. United States v.*
22 *Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526
23 (9th Cir. 1985).

24 A movant fails to state a claim upon which relief can be granted when he fails to meet
25 the statute of limitations. As the Court has discussed in its prior orders, section 2255 provides
26 a very narrow post-conviction remedy when a new rule of constitutional law emerges after

1 the statute of limitations has passed.¹ In such cases, the statute provides that the limitation
2 period runs from "the date on which the right asserted was initially recognized by the
3 Supreme Court, if that right has been newly recognized by the Supreme Court and made
4 retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(3). Mr. Collicott
5 contends that his petition is timely because it was filed on February 16, 2006, which is within
6 one-year of the date the Ninth Circuit determined that *Crawford* was retroactive to cases on
7 collateral review. *See Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005). Although Mr.
8 Collicott's petition would have been timely under the Ninth Circuit's reading of § 2255(3), *see*
9 *United States v. Valdez*, 195 F.3d 544 (9th Cir. 1999), the Supreme Court recently interpreted
10 this language to mean that the one-year clock begins to tick on the date that the Supreme
11 Court initially *recognizes* the right asserted, not from the date on which the right was made
12 retroactively applicable. *See Dodd v. United States*, 125 S.Ct. 2478 (2005). In the matter *sub*
13 *judice*, the clock began ticking on March 8, 2004, the date that *Crawford* was decided. Mr.
14 Collicott's petition, filed February 15, 2006, is therefore untimely.

15 CERTIFICATE OF APPEALABILITY

16 An appeal of this Order may not be taken unless this Court or a Circuit Justice
17 issues a certificate of appealability, finding that "the applicant has made a substantial showing
18 of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2004). This requires
19 a showing that "reasonable jurists would find the district court's assessment of the
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21 ¹ The Court notes that Mr. Collicott is also under the impression that his pending §
22 2255 motion is a successive petition. This is incorrect. His first § 2255 motion, filed May 25,
23 2005, was denied *without* prejudice and therefore does not count as a strike against him. Mr.
24 Collicott's December 30, 2005 filing was a Motion for Writ of Audita Querela. That motion
25 was not construed as a § 2255 petition and does not have any effect on Mr. Collicott's present
26 motion.

1 constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
2 "When the district court denies a habeas petition on procedural grounds without reaching the
3 prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at
4 least, that jurists of reason would find it debatable whether the petition states a valid claim of
5 the denial of a constitutional right and that jurists of reason would find it debatable whether
6 the district court was correct in its procedural ruling." *Id.* A certificate of appealability should
7 not be granted unless both components, one directed at the underlying constitutional claims,
8 and the second directed at the court's procedural holding, are satisfied. *Id.*

9 Based on the Court's preceding analysis, the Court concludes that the Movant
10 has made a substantial showing of a denial of a constitutional right. The factual scenario
11 he presents falls squarely within the holding of *Crawford v. Washington, supra*, and
12 implicates his Sixth Amendment right to confrontation. The question of whether jurists of
13 reason would find the Court's statute of limitations ruling debatable is a more difficult call.
14 This Court is bound to apply *Dodd v. United States*, 125 S.Ct. 2478 (2005), and is unaware
15 of any tolling provision which would save Mr. Collicott's claim. However, the Court is also
16 of the opinion that Ninth Circuit review of this matter is appropriate to ensure that Mr.
17 Collicott's habeas petition is completely foreclosed. Thus, a certificate of appealability shall
18 issue. Accordingly,

19 **IT IS ORDERED** that Movant's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or
20 Correct Sentence, **CR-94-184, Ct. Rec. 157; CV-06-053, Ct. Rec. 1**, is **DENIED**.

21 The District Court Executive is directed to:

- 22 • File this Order and provide copies to pro se Movant and to the United States
23 Attorney in Spokane, Washington;
- 24 • Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice of
25 Appeal that a certificate of appealability is **GRANTED**; and
- 26 • **CLOSE** the corresponding civil file, **CV-06-0053-WFN**.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE